

# In the United States Court of Federal Claims

Nos. 02-1042T and 04-1595T (consolidated)  
(Filed: August 17, 2007)

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TOMMY J. SHELTON,

*Plaintiff,*

v.

THE UNITED STATES,

*Defendant.*

\* \* \* \* \*

## OPINION

BRUGGINK, *Judge.*

This case is one of approximately thirty partnership tax refund suits brought by partners of various partnerships marketed by the Greenberg Brothers Partnership. In an order issued on October 24, 2005, the court selected two of these Greenberg-related cases, Case No. 02-1041T (*Bush*) and Case No. 02-1042T (*Shelton*), for briefing and representative resolution.<sup>1/</sup>

Plaintiff has moved for summary judgment with regard to a portion of his claims. In this pending summary judgment motion, plaintiff claims that post-settlement assessments for tax years 1981, 1985-1987, 1989, 1992 and 1995, made by the Internal Revenue Service (“IRS”), were invalid because a statutory notice of deficiency was not issued prior to the assessments. Defendant has cross-moved. The matter is fully briefed. Oral argument was heard on August 8, 2007.

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<sup>1/</sup>Case No. 02-1041T was consolidated with Case No. 04-1598T and Case No. 02-1042T with Case No. 04-1595T. The remaining Greenberg-related cases were stayed.

For reasons set out below, we deny plaintiff's motion and grant defendant's cross-motion for partial summary judgment.

## BACKGROUND

Plaintiff was a limited partner in the Greenberg Brothers Partnership Cinema '84 ("Cinema '84") for tax years 1984 to 1995. On October 15, 1991, the IRS issued Notices of Final Partnership Administrative Adjustment ("FPAA") to the then Tax Matters Partner ("TMP") for Cinema '84 for tax years 1984-1989, disallowing deductions reported on the partnership returns for those tax years.

The TMP filed a petition on behalf of Cinema '84 in the United States Tax Court on January 8, 1992, challenging the IRS's proposed adjustments for the partnership. On December 2, 1994, plaintiff filed a notice of election to participate in the Tax Court proceeding involving Cinema '84.

On August 7, 1999, while the partnership proceeding involving Cinema '84 was pending in the Tax Court, plaintiff and the IRS entered into a Form 906 Closing Agreement on Final Determination Covering Specific Matters ("Closing Agreement"), settling matters with respect to Cinema '84. Subsequently, on September 1, 2000, the Tax Court dismissed plaintiff as a party in the Cinema '84 partnership proceeding.<sup>2/</sup>

The Closing Agreement provided in relevant part:

1. No adjustment to the partnership items shall be made for the taxable years 1984 through 1995 for purposes of this settlement.
2. The taxpayers<sup>3/</sup> are entitled to claim their distributive share of the partnership losses for 1984 through 1995 only to the extent they are at risk under I.R.C. § 465.

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<sup>2/</sup>The Tax Court dismissed the proceeding with respect to the rest of the participants upon conclusion of partnership-level matters.

<sup>3/</sup>Although the text of the Closing Agreement refers to "taxpayers" as plural, the agreement was entered between the IRS and plaintiff, an individual.

3. The taxpayers' amount at risk for 1984 through 1989 is their capital contribution to the partnership.
4. The taxpayers' capital contribution to the partnership is \$150,000.
5. Taxpayers' qualified investment for computing investment tax credit is the amount at risk as set forth in paragraph #4.
6. The taxpayers are not at risk under I.R.C. § 465 for any partnership notes, entered into by the partnership to acquire rights in the motion pictures . . . , whether or not assumed by the taxpayers. Any losses disallowed under this agreement are suspended under I.R.C. § 465. Such suspended losses may be used to offset the taxpayers' pro rata share of any income earned by the partnership and/or other income in accordance with the operation of I.R.C. § 465.
7. To the extent the taxpayers make additional cash contributions to the capital of the partnership after 1989, the taxpayers' amount at risk will be increased in accordance with I.R.C. § 465.
8. To the extent the partnership earns net income the taxpayers' at risk will be increased in accordance with I.R.C. § 465.
9. To the extent the taxpayers make cash payments on the partnership notes after the date of execution of this agreement by the Commissioner and the taxpayers, the taxpayers' amount at risk will be increased in accordance with I.R.C. § 465.
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15. Any refund claim attributable to the operation of this agreement shall be deemed to be timely filed and shall be allowed if it is filed with the IRS within one year of the execution of this agreement by the Commissioner of Internal

Revenue. Any refund claim so submitted pursuant to this paragraph within 120 days after the execution of this agreement on behalf of the Commissioner of Internal Revenue shall be allowed as an offset pursuant to I.R.C. §§ 6402(a) and 6601(f) against any tax deficiencies resulting from this agreement.

#### Closing Agreement (Aug. 7, 1999).

On December 2, 1999, plaintiff filed refund claims with the IRS for tax years 1988, 1990-1993, 1995 and 1996. While these refund claims were still pending, on July 20, 2000, the IRS issued Forms 4549A-CG, notices of adjustment, showing adjustments it made to plaintiff's 1981, 1984-1995 tax years. For tax year 1984, plaintiff was allowed to deduct \$135,561.00 in losses from Cinema '84, using up the bulk of the § 465 amount available under the Closing Agreement.

In the original return for tax year 1985, plaintiff had reported losses for Cinema '84 in the amount of \$64,658.00. The notice of adjustment allowed \$14,439 of the reported losses, the balance remaining from the stipulated amount at-risk after the previous year's deduction. This resulted in an adjustment of \$50,219.00 and an increase in adjusted gross income, which, accordingly, reduced the amount of medical expenses that are deductible by \$1,887.00. These adjustments increased plaintiff's tax liability for 1985 by \$9,444.00.

In the original return for tax year 1986, plaintiff had reported \$60,242.00 for losses from Cinema '84. The amount at-risk had been reduced to zero, so the notice of adjustment for plaintiff's 1986 tax year allowed none of the these losses. The resulting increase in plaintiff's adjusted gross income led to adjustments in the allowable amount of charitable contributions as well as medical expenses that could be deducted. These adjustments resulted in an increase in plaintiff's tax liability for 1986 of \$8,134.00.

For tax year 1987, plaintiff had reported passive losses from Cinema '84 in the amount of \$51,522.00. The notice of adjustment disallowed a portion of the passive losses reported by plaintiff for all of the partnerships in which he was a partner. As for the non-passive loss for Cinema '84, the notice allowed \$42.00 for the non-passive interest income from Cinema '84. There was also an adjustment on the capital loss carryover as well as a contribution carryover due to an adjustment in taxable income in prior tax years. These adjustments resulted in an additional tax liability in the amount of \$1,346.00 for 1987.

For tax year 1989, plaintiff reported losses from Cinema '84 in the amount of \$3,131.00. The notice of adjustment for plaintiff's 1989 tax year showed a disallowance of most of plaintiff's passive losses from all of his partnerships, including Cinema '84. Non-passive interest income of \$1.00 for Cinema '84 also resulted in an adjustment. These adjustments increased plaintiff's 1989 tax liability by \$811.00.

Plaintiff's original return for the 1992 tax year reported neither gain nor loss from Cinema '84. The notice of adjustment for plaintiff's 1992 tax year showed a disallowance of \$3,000.00 in capital loss carryover due to an adjustment in taxable income in prior tax years. Plaintiff's overall tax liability was increased by \$958.00.

Plaintiff's original return for 1995 reported a loss of \$5,330.00 from the disposition of plaintiff's interest in Cinema '84. The notice of adjustment for plaintiff's 1995 tax year showed a disallowance of \$5,288.00. Plaintiff's 1995 tax liability was increased by \$1,891.00.

On August 4, 2000,<sup>4/</sup> the IRS made the assessments based on the adjustments described above. For plaintiff's 1981 tax year, the IRS assessed \$9,782.00 in tax and \$61,329.37 in interest. For plaintiff's 1985 tax year, the IRS assessed \$9,444.00 in tax and \$35,147.78 in interest. For plaintiff's 1986 tax year, the IRS assessed \$8,134.00 in tax and \$26,500.86 in interest. For plaintiff's 1987 tax year, the IRS assessed \$1,346.00 in tax and \$3,193.01 in interest. For plaintiff's 1989 tax year, the IRS assessed \$811.00 in tax and \$1,115.49 in interest. For the 1992 tax year, the IRS assessed \$958.00 in tax and \$802.02 in interest. For the 1995 tax year, the IRS assessed \$1,891.00 in tax and \$785.46 in interest. There was no notice of deficiency issued prior to these assessments. On August 28, 2000, plaintiff paid the assessed tax and interest for these tax years.

On August 23, 2000, the IRS allowed a portion of plaintiff's 1990, 1991 and 1993 refund claims while denying a balance of those claims and all of his 1992, 1995 and 1996 refund claims. On August 23, 2002, plaintiff filed a

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<sup>4/</sup>Plaintiff notes that he is not conceding August 4, 2000 as the actual date of assessment and is using the date only for purposes of the present motion. Plaintiff further states that he plans to challenge the date of assessment if the present motion is not granted.

complaint with this court, seeking a refund of the tax and interest he paid for tax years 1988, 1990-1993, 1995 and 1996 (Case No. 02-1042T).

On about July 25, 2002, plaintiff filed a new round of refund claims with the IRS for tax and interest for tax years 1981, 1985-1987, 1989, 1992 and 1995 with respect to the assessments issued by the IRS on July 12, 2000. When the IRS denied the refund claims on October 25, 2002, plaintiff filed the refund suit with this court on October 25, 2004 (Case No. 04-1595T). This case was later consolidated with Case No. 02-1042T, filed by plaintiff in this court on August 23, 2002.

Plaintiff filed the present motion for summary judgment on December 29, 2006, claiming that he is entitled to a refund of the tax and interest paid for tax years 1981, 1985-1987, 1989, 1992 and 1995, with respect to the issues raised by the second round of refund claims, because the IRS improperly assessed tax deficiencies without issuing a prior statutory notice of deficiency. Defendant has cross-moved and claims that no statutory notice of deficiency was required and that the assessments were properly made.

## DISCUSSION

The legal issues in this case are virtually identical to the companion case, *Bush v. United States*, Case Nos. 02-1041T and 04-1598T (consolidated). We, therefore, incorporate by reference into this opinion, our analysis and holdings in *Bush*. Only points of factual difference are addressed herein.

The resolution of these cross-motions turns on whether the IRS was required to issue a statutory notice of deficiency prior to its assessments following execution of the Closing Agreement. As we explained in *Bush*, no non-computational determination is required to determine any tax deficiency attributable to plaintiff's amount at-risk for the years at issue in the cross-motions. In paragraphs 2 through 9 of the Closing Agreement, plaintiff and the IRS stipulated to plaintiff's at-risk amount as well as how it may be increased. The Closing Agreement, in paragraph 3, provided that the source of plaintiff's amount at-risk for tax years 1984 through 1989 was his capital contribution to the partnership. Plaintiff and the IRS stipulated that the exact amount of plaintiff's capital contribution and, hence, his amount at-risk, was \$150,000.00. The IRS allowed plaintiff to deduct \$135,561.00 in losses from Cinema '84 for tax year 1984. Plaintiff, therefore, had \$14,439.00 remaining as the § 465 amount available under the Closing Agreement.

For plaintiff's tax year 1985, plaintiff had reported losses from Cinema '84 in the amount of \$64,658.00. Because plaintiff's available at-risk allowance was \$14,439.00, the IRS allowed that amount and disallowed the remaining \$50,219.00. The adjustment of tax liability and interest was then made accordingly. For tax year 1986, plaintiff had no more at-risk amount available under the Closing Agreement. The IRS, therefore, disallowed all of plaintiff's reported losses from Cinema '84, \$60,242.00. The resulting tax liability and interest were adjusted accordingly.

For tax year 1987, plaintiff's at-risk amount was increased by \$42.00 of interest income from Cinema '84, according to paragraph 8 of the Closing Agreement. The IRS also disallowed a portion of passive losses from Cinema '84 in the amount of \$51,522.00. The adjustment of tax liability and interest was then made accordingly. For tax year 1989, plaintiff's at-risk amount was increased by \$1.00 of interest income from cinema '84. Most of plaintiff's reported passive losses from all of his partnerships were disallowed. Plaintiff's tax liability and interest were adjusted accordingly.

For tax year 1992, the IRS disallowed plaintiff's capital loss carryover of \$3,000.00 due to an adjustment in taxable income in prior tax years. There were no other adjustments. The resulting tax liability and interest were then adjusted. For tax year 1995, the IRS disallowed \$5,288.00 of reported loss of \$5,330.00 from the disposition of plaintiff's interest in Cinema '84. Plaintiff's tax liability and interest were then adjusted.

The parties' arguments are identical to those raised in *Bush*. As we held in *Bush*, we reject plaintiff's argument that his at-risk amount is *per se* an affected item requiring factual determination, that any partner-level determinations were either made or required here triggering the notice of deficiency requirement, or that paragraph 15 of the Closing Agreement necessitates a partner-level determination. The assessments at issue were properly made.<sup>5/</sup>

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<sup>5/</sup>The ruling is without prejudice to plaintiff's position regarding the date of the assessments. See footnote 4, *supra*.

## CONCLUSION

For the reasons set forth herein and in the court's opinion in *Bush*, we deny plaintiff's motion for summary judgment and grant defendant's cross-motion for partial summary judgment.

s/ Eric Bruggink  
ERIC G. BRUGGINK  
Judge